FILE COPY

NOV 17

CHARLES ELMORE

In The

Supreme Court of The United States

OCTOBER TERM, 1930.

No. 464

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, and A. R. McDONALD, as members thereof, and JOHN W. REYNOLDS, as ATTORNEY GENERAL FOR THE STATE OF WISCONSIN,

Appellants,

vs.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, a Wisconsin corporation, and WASHBURN WATER WORKS COMPANY, a Wisconsin Corporation,

Appellees.

Brief for Appellants.

JOHN W. REYNOLDS,
Attorney General of
the State of Wisconsin,

SUEL O. ARNOLD,
Special Counsel,
Attorneys for Appellants.

Hess Linotyping Co.—Milwaukee.

SYNOPSIS AND INDEX.

	Page
STATEMENT OF THE CASE	2-5
SPECIFICATION OF ASSIGNED ERRORS	5-7
SUMMARY OF ARGUMENT	7-8
ARGUMENT:	
I. Cost of reproduction is not necessarily the sole or dominant element to be considered in fixing the value of public utility property	9-20
II. The lower court erred in failing to find the facts showing the economic conditions prevailing in the City of Washburn	20-26
(a) Diminution in value of property in the City of Washburn	21-22
(b) Decline in population	23-25
(c) Scarcity of industry in the City	25
(d) Evidence of economic conditions practically undisputed	25-26
III. The lower court erred in holding the value of $75,000.00 fixed by the Railroad Commission to be confiscatory	26-39
(a) Economic conditions in the City of Washburn may be considered in fixing the value of public utility property	27-30
(b) Utility plant is larger than is necessary to serve the present population of the City of Washburn, and the lower court erred in failing to so find	30-32

Synopsis of Argument—*Continued.*

Page

(c) The value of the service rendered must be considered in determining the value of public utility property 32-35

(d. Value of $75,000.00, established by the order of the Commission, is not unreasonable 35-36

(e) The lower court erred in finding that the going value of the utility property amounted to $5,000.00 36-39

IV. The lower court erred in holding the rates provided by the order of the Commission to be confiscatory 40-50

(a) The lower court erred in holding that the Railroad Commission had no jurisdiction to reduce operating expenses of the utility.. 40-45

(b) The lower court erred in holding that the refusal of the Commission to allow any sum for amortization of accrued legal and Railroad Commission expense was arbitrary and unsupported by the evidence.... 46-48

(c) The lower court erred in holding that a return of 7% on a value of $75,000.00 was confiscatory 48-50

CONCLUSION 51

CASES CITED

Page

Ashland Water Co. vs. Railroad Comm., 7 Fed. (2nd) 924 ..... 9, 32, 35

Bluefield Water Works & Imp. Co. vs. Public Service Comm., 262 U. S. 679 ..... 9, 15, 16, 48

Board of Public Utility Comrs. vs. New York Teleph. Co., 271 U. S. 23 ..... 46, 47

Brooklyn Borough Gas Co. vs. Prendergast, 16 Fed. (2nd) 615 41

Brooks-Scanlon Corp. vs. U. S., 265 U. S. 106 18

Cedar Rapids Gaslight Co. vs. Cedar Rapids, 223 U. S. 655 ..... 14, 49

Covington & Lexington Turnpike Road Co. vs. Sandford, 164 U. S. 578 ..... 12, 14, 33, 34, 35

Darnell vs. Edwards, 244 U. S. 564 ..... 14, 30, 33, 34

Dayton-Goose Creek R. Co. vs. U. S., 263 U. S. 456 49

Denver vs. Denver Union Water Co., 246 U. S. 178 37

Des Moines Gas Co. vs. Des Moines, 238 U. S. 153 ..... 14, 35, 37, 49

Galveston Elec. Co. vs. Galveston, 258 U. S. 388 ..... 14, 39, 47

Georgia R. & Power Co. vs. Railroad Comm., 262 U. S. 625 ..... 9, 15, 16, 33, 47

Knoxville vs. Knoxville Water Co., 212 U. S. 1 ..... 13, 36

McCardle vs. Indianapolis Water Co., 272 U. S. 400 ..... 16, 17, 20, 37, 49

Minnesota Rate Cases, 230 U. S. 352 ..... 15, 16, 17, 27, 35

Missouri ex rel. Southwestern Bell Teleph. Co. vs. Public Service Comm., 262 U. S. 276 ..... 9, 15, 16, 41

Monroe Gaslight & Fuel Co. vs. Michigan Public Utilities Comm., 292 Fed. 139 ..... 9, 10

Newton vs. Consolidated Gas Co., 258 U. S. 165 14

New York & Richmond Gas Co. vs. Prendergast, 10 F. (2nd) 167 38

New York Telephone Co. vs. Prendergast, 300 Fed. 822 38

Cases Cited—*Continued.*

Page

Northern Pacific R. Co. vs. Dept. Public Works, 268 U. S. 39 50
Omaha vs. Omaha Water Co., 218 U. S. 180 .....13, 14
Railroad Comm. vs. Maxcy, et al., 281 U. S. 82 2
Reagan vs. Farmers Loan & T. Co., 154 U. S. 362....14, 33, 34
St. Louis & O'Fallon R. Co. vs. U. S., 279 U. S. 461 .....19, 33
San Diego Land & T. Co. vs. Jasper, 189 U. S. 439.....33, 34
San Diego Land & T. Co. vs. National City, 174 U. S. 739 12
Smyth vs. Ames, 169 U. S. 466 ....10, 11, 12, 13, 15, 18, 32, 35
Southern Ry. Co. vs. Kentucky, 274 U. S. 76.....18, 30, 33, 39
Standard Oil Co. vs. Southern Pacific Co., 268 U. S. 146 .....18, 35
Stanislaus County vs. San Joaquin & K.'s R. C. & I. Co., 192 U. S. 201 12
State Public Utilities Comm. vs. Springfield Gas & E. Co., 291 Ill. 209 41
Town of Fletcher vs. Hickman, 165 Fed. 403 .....24, 25
United Fuel Gas Co. vs. Railroad Comm., 278 U. S. 300 35
United Ry. & Electric Co. vs. West, 280 U. S. 234.....35, 49
Washburn Water Works Company vs. City of Washburn, 218 N. W. 825 46
Willcox vs. Consolidated Gas Co., 212 U. S. 19....13, 17, 48, 49

In The

Supreme Court of The United States

OCTOBER TERM, 1930.

No. 464

RAILROAD COMMISSION OF WISCONSIN, LEWIS E. GETTLE, ADOLPH KANNEBERG, and A. R. McDONALD, as members thereof, and JOHN W. REYNOLDS, as ATTORNEY GENERAL FOR THE STATE OF WISCONSIN,

Appellants,

vs.

W. G. MAXCY, as Receiver of the Washburn Water Works Company, a Wisconsin corporation, and WASHBURN WATER WORKS COMPANY, a Wisconsin Corporation,

Appellees.

Brief for Appellants.

On April 5, 1929, a decree was handed down by the District Court of the United States for the Western District of Wisconsin, three judges sitting as a statutory District Court, perpetually enjoining the appellants, Lewis E. Gettle, Adolph Kanneberg, and A. R. McDonald, constitut-

ing the Railroad Commission of Wisconsin, and John W. Reynolds, as Attorney General of the State of Wisconsin, from taking any steps to enforce the order of the Railroad Commission of Wisconsin dated December 4, 1928, and restraining the appellants from interfering with the Washburn Water Works Company or its receiver, W. G. Maxcy, in charging and collecting reasonable rates for water furnished in the city of Washburn, Wisconsin.

The lower court made no Findings of Fact or Conclusions of Law, and did not file an opinion. Upon appeal to this court from the decree dated April 5, 1929, the decree was reversed and the case remanded to the statutory three-judge court for Findings of Fact and Conclusions of Law, and a decree thereon. *Railroad Comm. vs. Maxcy, et al.*, 281 U. S. 82. Pursuant to said mandate, the statutory three-judge court filed its Findings of Fact and Conclusions of Law, and a decree thereon, under date of July 5, 1930. This is an appeal from the latter decree.

STATEMENT OF THE CASE.

The Washburn Water Works Company was organized as a Wisconsin corporation in 1889 for the purpose of operating a water utility in the city of Washburn, Wisconsin, and has operated a water utility in the City continuously since that time (R. 84). Since the 19th day of May, 1925, the affairs of the corporation have been in charge of W. G. Maxcy, as receiver (R. 3). On December 12, 1927, the receiver attempted to file with the Railroad Commission of Wisconsin a schedule of rates in excess of the rates previously authorized by the Commission (R. 32, 8), but the Commission refused to file these schedules (R. 8). Thereafter the receiver filed with the Railroad Commission of Wisconsin an application for an increase in rates (R. 8-9).

The Railroad Commission proceeded to hold a hearing upon the application, evidence was introduced before the Commission, and on December 4, 1928, the Railroad Commission entered an order denying an increase in general service rates, but granting an increase in rates for fire protection service (R. 37-41).

Prior to December 4, 1928, the Railroad Commission of Wisconsin had made several valuations of the property of the Washburn Water Works Company. In the order entered in December, 1910, the Commission found the investment cost of the Washburn Water Works property before depreciation to be $69,348.00 and the depreciated value to be $63,803.00 (R. 7). A valuation was made by the Commission in October, 1921, in which the Commission added to the valuation made in 1910 the additions made subsequent to that date, and thereby obtained the figure of $80,792.00 which was used as a rate base by the Commission at that time (R. 7). The Railroad Commission made a valuation of the property as of June 30, 1923, in which the Commission found the value of the property based on cost of reproduction new to be $132,862.00, and the value based on a ten year average price basis to be $106,868.00, undepreciated, and a depreciated value to be $91,599.00 (R. 7). Some time later a proceeding was instituted by the City of Washburn to acquire the property of the Washburn Water Works Company, and as a part of this proceeding the Commission, under date of April 10, 1924, found the value of the Washburn Water Works property to be $50,000.00 (R. 32).

On December 4, 1928, the Railroad Commission entered the order which was attacked by the utility and which was found to be confiscatory by the statutory three-judge District Court (R. 37-41). In that order the Commission found that the fair value of the utility property for rate

making purposes was $75,000.00 (R. 38). The Commission found that the reproduction cost of the utility property as of January 1, 1928, on a present price basis, undepreciated, was $114,089.00, and that the cost of reproduction new, depreciated, was $87,116.00 (R. 38). These figures did not include any allowance for working capital, materials and supplies, or going value. It is conceded by the Commission that the sum of $1,700.00 is a fair allowance for working capital, and that the sum of $800.00 is a fair allowance for materials and supplies (R. 122).

The Commission in the order of December 4, 1928, also found that a considerable saving in operating costs could be effected by the installation of meters and a smaller electric pump, and estimated that the total operating costs for the year 1928, exclusive of depreciation reserve, taxes, interest and return, would amount to $8,188.00 (R. 40). The Commission refused to make any allowance for the disbursements made by the utility in the past for legal services in attacking the Commission's order (R. 40). The Commission estimated that the revenues for the year 1928 would amount to $17,720.40 (R. 40), and denied an increase in the general rates, but allowed an increase in hydrant rentals to be charged to the City of Washburn for fire protection service (R. 41). The Commission estimated that upon the rates fixed by the order, the utility would earn a return of 7% upon a value of $75,000.00 (R. 40).

In finding the value of $75,000.00 for the utility property, the Commission calls attention to the fact that the utility property is located in a city in which every other class of property has suffered a great decline in value; that there was no indication that such decline was temporary, or that substantial values would be re-established; that to hold that the utility property had not suffered by the decline would be to ignore the facts; and that no purchaser

having freedom of action would pay for the utility property anywhere near the investment or original cost of reproduction (R. 37-38).

The statutory three-judge District Court found that as of December 4, 1928, the lowest estimate of cost of reproduction of the property, undepreciated, was $121,716.00, and depreciated was $93,364.00 (R. 72). These values related only to physical property included in the plant (R. 72). By including the sum of $800.00 for materials and supplies and the sum of $1,700.00 for working capital and the further sum of $5,000.00 for going value, the lower court found that the lowest estimate of value based on cost of reproduction new was $100,864.00 (R. 72).

The lower court found that the rate base of $75,000.00 was arbitrary, confiscatory and contrary to the evidence; that the failure of the Commission to accept actual operating expenses of the company was arbitrary and unsupported by the evidence and constituted an arbitrary interference with the utility's right to manage its property; that the refusal of the Commission to allow an item of expense for amortization for legal and railroad commission expense incurred in the past was arbitrary and unsupported by the evidence; that the rate of return provided by the order was confiscatory, and that the order deprives the utility of its property without due process of law (R. 76-77).

From a decree restraining the appellants from enforcing the order, an appeal has been taken to this court.

SPECIFICATION OF ASSIGNED ERRORS.

FIRST. Error in failing to find facts showing the economic conditions prevailing in the City of Washburn, which includes scarcity of industries in the City, low property values, diminution in population, diminution in value

of real estate owned by the Washburn Water Works Company, and tax delinquent property.

SECOND. Error in failing to hold that the economic conditions prevailing in the City of Washburn is an element to be considered in determining the value of public utility property for rate making purposes.

THIRD. Error in holding that the valuation and rate base of $75,000.00, established by the order of the Commission dated December 4, 1928, was arbitrary, confiscatory, and contrary to the evidence.

FOURTH. Error in failing to find that the Washburn Water Works utility plant was larger than is required to serve the present population of the City of Washburn.

FIFTH. Error in holding that the going value of the utility property amounted to $5,000.00.

SIXTH. Error in holding that the return provided by the order was confiscatory.

SEVENTH. Error in failing to find that past operating expenses have been wasteful and extravagant and that such expenses might be reduced to $8,188.00, exclusive of depreciation and taxes, by the installation of meters, and additional pump and smaller motor.

EIGHTH. Error in holding that the refusal of the Commission to allow any sum for amortization for accrued legal and railroad commission expense was arbitrary and not supported by the evidence.

NINTH. Error in permanently enjoining the appellants from taking any steps to require the utility to carry out the directions contained in the order of December 4, 1928.

SUMMARY OF ARGUMENT.

I. COST OF REPRODUCTION IS NOT NECESSARILY THE SOLE OR DOMINANT ELEMENT TO BE CONSIDERED IN FIXING THE VALUE OF PUBLIC UTILITY PROPERTY.

II. THE LOWER COURT ERRED IN FAILING TO FIND THE FACTS SHOWING THE ECONOMIC CONDITIONS PREVAILING IN THE CITY OF WASHBURN.

(a) Diminution in value of property in the City of Washburn.

(b) Decline in population.

(c) Scarcity of industry in the City.

(d) Evidence practically undisputed.

III. THE LOWER COURT ERRED IN HOLDING THE VALUE OF $75,000.00, FIXED BY THE RAILROAD COMMISSION, TO BE CONFISCATORY.

(a) Economic conditions in the City of Washburn may be considered in fixing the value of public utility property.

(b) The utility plant is larger than is required to serve the present population of the City of Washburn, and the lower court erred in failing to so find.

(c) The value of the service rendered must be considered in determining the value of public utility property.

(d) The value of $75,000.00 fixed by the Railroad Commission is not unreasonable.

(e) The lower court erred in finding that going value amounted to $5,000.00.

IV. THE LOWER COURT ERRED IN HOLDING THE RATES PROVIDED BY THE ORDER OF THE COMMISSION TO BE CONFISCATORY.

(a) The lower court erred in holding that the Commission arbitrarily reduced operating expenses.

(b) The lower court erred in holding that the refusal of the Commission to allow any sum for amortization of accumulated Railroad Commission and legal expense was arbitrary.

(c) The lower court erred in holding that a return of 7% on a value of $75,000.00 was confiscatory.

Argument.

I. COST OF REPRODUCTION IS NOT NECESSARILY THE SOLE OR DOMINANT ELEMENT TO BE CONSIDERED IN FIXING THE VALUE OF PUBLIC UTILITY PROPERTY.

The lower court did not specifically hold that cost of reproduction is the sole or dominant element to be considered in valuing public utility property. It did, however, refuse to find the facts showing the economic conditions prevailing in the City of Washburn, although duly requested to make such findings (R. 139-141). The lower court, however, did find that the valuation and rate base of $75,000.00, fixed by the order of the Commission, was not supported by any evidence of economic conditions of peculiar local conditions affecting the value of public utility property, and was arbitrary and confiscatory.

The lower court filed no opinion, but Judge Geiger and Judge Luse, two of the judges who sat with the statutory three-judge District Court below, also sat with the statutory three-judge District Court in *Ashland Water Co. vs. Railroad Comm.*, 7 Fed. (2nd) 924. In that case Judge Geiger, who wrote the opinion of the court, concurred in by Judge Luse (Evans, Circuit Judge dissenting), after referring to *Missouri ex rel Southwestern Bell Tel. Co. vs. Public Service Commission*, 262 U. S. 276, *Bluefield Waterworks & Imp. Co. vs. Public Service Commission*, 262 U. S. 679, and *Georgia R. & Power Co. vs. Railroad Comm.*, 262 U. S. 625, said, page 927:

> "We need not at this time consider whether the estimate above placed upon the three decisions is correct. Whether, as suggested in the Monroe Gas

> Co. Case (D. C.), 292 F. 139, present reproduction costs must be *dominantly* reflected in a finding, it would seem that, if the rule of the three cases was worth while promulgating, it contemplated that at least *due* or *substantial consideration* of the evidence of present reproduction costs be reflected in the finding."

We believe the lower court was imbued with the idea that cost of reproduction must be substantially or dominantly reflected in the valuation of all public utility property in all circumstances. In arriving at this conclusion the lower court did not properly interpret the principles laid down by the United States Supreme Court applicable to public utility valuations.

It is now well settled that a public utility is entitled to "fair return" upon the "fair value" of its property used and useful for public services. *Smyth vs. Ames*, 169 U. S. 466.

In approaching the question as to the manner in which fair value shall be determined, we fully appreciate that we are invading one of the most highly controversial fields in modern jurisprudence. At the same time, we are convinced that little difficulty need be experienced in valuing public utility property if the inquiry is confined to an honest and impartial search for a sum which will represent true value of the utility property. The problem, as we view it, is not essentially different from that presented in any case where value is sought. It is true that in many cases the term "value" is equivalent to "fair market value," but in the case of public utility property, which is not commonly bought and sold on the market, other guides or standards must be adopted in order to determine value, yet the ultimate fact to be determined is, nevertheless, value. We do not believe that the decisions of the Supreme Court of the

United States lay down any rigid rules, nor establish any formulas which must be followed in every valuation case.

In the leading case of *Smyth vs. Ames*, 169 U. S. 466, the United States Supreme Court first established the rule which is commonly denominated "cost of reproduction." In that case certain railroads in Nebraska contended that the value of their property should be based solely upon investment cost. In rejecting this contention, the Supreme Court said, pages 546-547:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. *We do not say that there may not be other matters to be regarded in estimating the value of the property.* What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." (Italics ours.)

This decision goes no further than to hold that a railroad is entitled to charge rates based on the fair value of the property used by it for the convenience of the public. The Supreme Court does not hold that any particular element of value must be given dominant consideration. Origi-

nal cost, the amount expended in improvements, the amount in value of bonds and stock, the present as compared with the original cost of construction, probable earning capacity of the property, and the sum required to meet operating expenses, may all be considered. Nor does the decision purport to enumerate all of the elements which may be considered in fixing value.

No serious disputes as to value arose in the cases immediately following the decision in *Smyth vs. Ames*, 169 U. S. 466. In *San Diego Land & T. Co. vs. National City*, 174 U. S. 739, it was held, following *Covington & Lexington Turnpike Road Co. vs. Sandford*, 164 U. S. 578, that: "Each case must depend upon its special facts," and that in valuing public utility property, "the interest both of the public and of the owner of the property" must be considered.

In *San Diego Land & T. Co. vs. Jasper*, 189 U. S. 439, 442-443, the court held that the cost of utility property might be considered in determining the value of public utility property, and that it would have more or less importance according to circumstances. But the court held (page 444), that the facts showed the value of the property, and the value of the service rendered, had greatly depreciated.

In *Stanislaus County vs. San Joaquin & K.'s R. C. & I. Co.*, 192 U. S. 201, the court holds (page 215) that a public utility may reasonably demand "a fair return upon the reasonable value of the property at the time it was being used for the public"; that in determining value, the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant and a fair profit to the company above its cost of services; that the utility is entitled to charge rates which, under all the

circumstances, would be just to the company and to the public.

In *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, 9, the court held that "the cost of reproduction is one way of ascertaining the present value of a plant like that of a water company," but, that there must be a deduction for depreciation. It was contended by the company (page 11) that the capitalization of the company ought to have some influence in determining the valuation of the property. The court held it to be a sufficient answer to the contention that the capitalization was shown to be considerably in excess of any valuation testified to by any witness, or which could be arrived at by any process of reasoning.

In *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19, the court, in discussing the elements to be considered in valuing public utility property, said, page 52:

> "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

Smyth vs. Ames, 169 U. S. 466, was followed without extended discussion in *Omaha vs. Omaha Water Co.*, 218

U. S. 180, *Cedar Rapids Gas Light Co. vs. Cedar Rapids*, 223 U. S. 655, *Des Moines Gas Co. vs. Des Moines*, 238 U. S. 153, *Newton vs. Consolidated Gas Co.*, 258 U. S. 165, and *Galveston Electric Co. vs. Galveston*, 258 U. S. 388.

The proponents of the "cost of reproduction" theory totally overlook the decision in *Darnell vs. Edwards*, 244 U. S. 564. In that case, the owner of a railroad about 17 miles in length, which ran through a timber company, filed a bill to restrain the enforcement of railway rates established by the Mississippi Railroad Commission. The court squarely holds that the conditions surrounding operation of the railroad, and the locality in which it is located, may be considered in fixing the value of the road for rate making purposes, and further holds that the value of railroad property may be less than cost of reproduction or investment cost. The court said (pages 569-570):

> "The evidence throws doubt upon the question whether the road, if built merely for the purpose of serving the timber country that is tributary to its present line, was not an extravagant venture. But, as yet, there has been no serious effort to develop traffic even from that country, aside from complainant's own properties. If the road was built rather as a branch of the Illinois Central, and with a view to extending it into a more lucrative territory, any extra cost of construction attributable to this is hardly to be accounted as a part of the fair value devoted to the use of the timber traffic. The circumstances that a road may have been unwisely built, in a locality where there is not sufficient business to sustain it, may be taken into account. *Reagan vs. Farmers Loan & T. Co.*, 154 U. S. 362, 412, 38 L. Ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. And the nature and value of the service rendered by the company to the public are matters to be considered. *Covington & L. Turnp. Road Co. vs. Sandford*, 164 U. S. 578, 597, 41 L. Ed. 560, 566, 17 Sup.

Ct. Rep. 198; *Smyth vs. Ames*, 169 U. S. 466, 544, 42 L. Ed. 819, 848, 18 Sup. Ct. Rep. 418.

In the case before us, if the earning capacity of the railroad, present and prospective, really is as small as appellant claims, it may be doubted whether the road is worth what it cost."

The elements to be considered in valuing public utility property, and the weight to be given such elements, is ably treated by the court in *Minnesota Rate Cases*, 230 U. S. 352, where the court held that each case must rest upon its special facts. It was held, following *Smyth vs. Ames*, 169 U. S. 466, that the basis of calculation is the "fair value of the property" at the time it is being used for the public.

The court further held that (page 434):

"The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

The court also said, page 452:

"The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty."

In the cases thus far considered, there is no intimation that cost of reproduction new is equivalent to, or must be dominantly reflected, in all valuations of public utility property. It will, however, be contended that the decisions in *Missouri ex rel. Southwestern Bell T. Co. vs. Public Service Comm.*, 262 U. S. 276, *Bluefield Water Works & Imp. Co. vs. Public Service Comm.*, 262 U. S. 679, *Georgia Ry. & Power Co. vs. Railroad Comm.*, 262 U. S. 625, and

McCardle vs. Indianapolis Water Co., 272 U. S. 400, lay down the principle that the cost of reproduction must always be dominantly reflected in valuing public utility property.

In *Missouri ex rel. Southwestern Bell T. Co. vs. Public Service Comm.*, 262 U. S. 276, the court said, page 287-288:

> "It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of probable future values made upon a view of all the relevant circumstances is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today."

In *Georgia Ry. & Power Co. vs. Railroad Comm.*, 262 U. S. 625, the court said, page 630:

> "The refusal of the commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct."

In *Bluefield Water Works & Imp. Co. vs. Public Service Comm.*, 262 U. S. 679 (page 691), the court cites and follows *Missouri ex rel. Southwestern Bell T. Co. vs. Public Service Comm.*, 262 U. S. 276, but at the same time the court cites and follows *Minnesota Rate Cases*, 230 U. S. 352, 434, to the effect that ascertainment of value of public utility property is not a matter of formulas nor controlled by artificial rules, but there must be reasonable judgment having its basis in a proper consideration of all relevant facts.

In *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 410-411, the court said:

> "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase. The decision of this court in *Smyth vs. Ames*, 169 U. S. 466, 547, 42 L. Ed. 819, 849, 18 Sup. Ct. Rep. 418, declares that to ascertain values 'the present as compared with the original cost of construction' is, among other things, matters for consideration. But this does not mean that the original cost or the present cost or some figure arbitrarily chosen between these two is to be taken as the measure.
>
> * * * * *
>
> Undoubtedly, the reasonable cost of a system of waterworks, well planned and efficient for the public service, is good evidence of its value at the time of construction. And such actual cost will continue fairly well to measure the amount to be attributed to the physical elements of the property so long as there is no change in the level of applicable prices."

We are unable to appreciate the force of any argument which leads to a conclusion that the four cases last cited changed the rule theretofore obtaining respecting the valuation of public utility property, or enunciated any new principles of valuation. These decisions must be considered in the light of the facts in each case. The valuations found to be confiscatory in these cases did not in fact reflect, or tend to reflect value. It has always been the law that public utility property is held in private ownership, "and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." *Minnesota Rate Cases*, 230 U. S. 352, 454.

It has also long been established that values of public utilities fluctuate, and that owners must bear the decline, and are entitled to the increase. *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19, 52.

These principles were not kept in mind when the valuations presented to the court in these cases were made. It was apparent, upon the face of those valuations, that no attempt was made to reflect present day value, and it was upon that ground, and that ground alone, that the valuations were held to be confiscatory.

That the Supreme Court has never changed the rule first enumerated in *Smyth vs. Ames*, 169 U. S. 466, is apparent in *Standard Oil Co. vs. Southern Pacific Co.*, 268 U. S. 146, 156, where it was held:

> "It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Again, in *Southern Railway Co. vs. Commonwealth of Kentucky*, 274 U. S. 76, it was held, page 81-82:

> "The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. *Smyth vs. Ames*, 169 U. S. 466, 547, 42 L. Ed. 819, 849, 18 Sup. Ct. Rep. 418. Much weight is to be given to present and prospective earning capacity at rates that are reasonable having regard to traffic available and competitive and other conditions prevailing in the territory served."

In *Brooks-Scanlon Corp. vs. U. S.*, 265 U. S. 106, 125, the court said:

> "This court has held in many cases that replacement cost is to be considered in the ascertainment of value, but that it is not necessarily the sole measure of or guide to value."

Lastly, any doubt as to the state of the law governing valuation of public utilities was definitely set at rest in *St. Louis & O'Fallon R. Co. vs. United States,* 279 U. S. 461, where the United States Supreme Court cites and follows *Smyth vs. Ames* and calls attention to the fact, page 484, that "the present cost of construction or reproduction" is one of the elements of value to be considered. There is no *holding* in this case that cost of reproduction must be substantially or dominantly reflected in valuing public utility property. Neither does the court pass upon the weight to be accorded to cost of reproduction new, because that question was not before the court. The basis of the decision is that Congress directed that valuations of railroads should be fixed upon a consideration of present cost, along with all other pertinent facts, and since the Interstate Commerce Commission did not consider present cost, it was held that the mandate of Congress had not been obeyed.

It is significant to note that in the O'Fallon case the Supreme Court specifically points out that the value of all railroads is not equal to cost of reproduction new. The court said, page 487:

> "No doubt there are some, perhaps many, railroads, the ultimate value of which should be placed far below the sum necessary for reproduction."

We must conclude, from the decisions of the court reviewed, that *Smyth vs. Ames,* 169 U. S. 466, still remains the law of the land, and that the value of public utility property is not to be determined by the use of formulas, or by the application of artificial rules, but that such value must be determined in the light of reasonable judgment having its basis in a proper consideration of all relevant facts. It is undoubtedly true that the value of public utility property, in the typical progressive community, can be most accurately reflected by giving substantial or domi-

nant consideration to cost of reproduction new. Such a value will more likely be commensurate with the value of other property in that community, and the utility will be entitled to share in the prosperity of the community to the extent that its property has actually increased in value. But even in these circumstances the value fixed need not be identical with cost of reproduction new, as is shown by the decision in *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, where the court held a valuation of $19,000,000.00 to be non-confiscatory, although the lowest reliable estimated value, based on cost of reproduction, was $22,000,000.00.

The principle that a utility is entitled to the increase in the value of its property has a corollary to the effect that a utility must bear the loss occasioned by decline in the value of its property. In the case of a retrogressive community, in which the population is constantly decreasing, and property values are diminishing, the value of utility property cannot escape being adversely affected thereby. To hold that cost of reproduction new must be applied in valuing utility property located in such community is to violate both the spirit and the language of the decisions of the United States Supreme Court.

II. THE LOWER COURT ERRED IN FAILING TO FIND THE FACTS SHOWING THE ECONOMIC CONDITIONS PREVAILING IN THE CITY OF WASHBURN.

In view of the rule requiring a consideration of all relevant facts in fixing the value of public utility property, the lower court erred in refusing to find the facts showing the economic conditions prevailing in the City of Washburn. The defendants duly requested the court to make such findings (R. 139-141), which include facts showing, (a)

diminution in value of property in City, (b) decrease in population, (c) scarcity of industries in the City. Such evidence was undisputed, with perhaps one exception, which will be hereafter noted.

(a) Diminution in Value of Property in the City of Washburn.

Mr. Peavy, who was formerly mayor of the City of Washburn (R. 98), and who has lived in the City of Washburn since the spring of 1910, testified at the hearing before the Railroad Commission held October 3, 1923 (R. 98), that the prices of property in the City of Washburn increased during the war; that in 1920, prices began to drop; that in 1920 and 1921, the City was visited by numerous disastrous fires; that in 1921 and 1922 there were numerous mortgage foreclosures (R. 98); that during the past twelve months (that is, prior to October 3, 1923), he did not know of a single *bona fide* sale of property in the City; that at mortgage foreclosure sales the only party bidding was the mortgagee; that in his opinion, property values in the City were reduced to practically nothing; that property values were less than assessed values, and that in his judgment, not five per cent of the property in Washburn could be sold for cash on the basis of assessed value (R. 99).

The decline in property values is not confined to any particular part of the City of Washburn. James M. Long, who had resided in the City of Washburn for thirteen years, and who was well acquainted with the City (R. 114), testified in his affidavit that Bayfield Street was the only improved street in the City and the only paved street (R. 114). His testimony shows that there is a tremendous number of vacant properties on the street (R. 114-115). It is apparent that property on the single paved thorough-

fare in a city is the most valuable, and the large number of vacant properties on Bayfield Street indicates that all property in the City of Washburn has declined in value.

The appellants introduced in evidence a map of the City of Washburn, together with the affidavit of Ludwig Tromwell and R. W. Smith (R. 118-119). The map is not printed in the transcript, but has been sent up to the court for inspection (R. 145-146). The map shows in red the property acquired by Bayfield County by tax deeds (R. 118), and shows in green the property upon which taxes are delinquent (R. 119). A glance at the map will show that taxes are delinquent on the majority of the property in the City, and that a large part of the property in the City has been acquired by the County through tax deeds.

The appellees introduced in evidence a statement showing the assessed and true values of property in the City of Washburn from 1924 to 1928, inclusive (R. 120). The statement shows that the true value of the property in the City amounted to $1,241,223.00 in the year 1914; to $2,195,776.00 in 1915; to $1,518,638.00 in 1916, and to $1,342,480.00 in 1928 (R. 120). It will be noted that the 1928 value exceeds the 1915 value only by the sum of $46,404.00, and that it is $116,158.00 less than the 1916 value. Further, the 1928 value is approximately $100,000.00 less than the 1926 value, and it appears that the decline in value has continued since 1919.

The extent of the decline in property values is illustrated by the decline in value of a portion of the real estate owned by the utility. In 1890, a parcel of real estate was purchased by the utility for $1,000.00 (R. 115-116). The utility now owns this parcel, together with other land, and yet the value placed upon all of the land owned by the utility, by the utility's witness, is $275.00 (R. 96).

(b) Decline in Population.

The population of the City of Washburn for the years 1905, 1910, and 1920, as disclosed by the affidavit of Thiessen, introduced by the appellants, was as follows (R. 108):

1905	4,924
1910	3,830
1920	3,707

Rev. Borucki, a Catholic priest in charge of the only Catholic congregation in the City of Washburn, testified in the affidavit introduced by the appellants that he has had charge of the Washburn congregation continuously since 1919; that according to the records of the church there were 1,265 members in the year 1917; that since 1919 there has been a constant and continuous decline in the membership of the church; that the membership of the church in 1928 was 544; that the cause of the shrinkage in membership was caused by the members moving out of Washburn to other localities (R. 113).

Rev. Christiansen testified in the affidavit introduced by the appellants that he is the pastor of the only Norwegian Evangelical Lutheran church in the City of Washburn, and that he has been in charge of the congregation for 22 years; that in the last six or seven years there has been a very substantial shrinkage in the number of members of his congregation; that from the best information available it appears there were 435 members in said congregation in 1914, and that at the present time the membership numbers 245; that said decrease in membership is due to shrinkage in the population of the City and is substantially in proportion to such shrinkage (R. 113-114).

V. E. Kimball testified in the affidavit introduced by the appellants that he is the city superintendent of the public schools in the City of Washburn, and has been such for sev-

eral years last past; that there are four public schools in the City, and that there are no private or parochial schools teaching general subjects of education in the City; that the school census reports for the year 1924 show that there were 1,252 children of school age in the City, but that he believes the report to be incorrect, and that in his opinion in 1924 there were more children of school age than said census shows; that the 1927 census shows 1,033 children of school age in the City; that the census report for the year 1928 shows 986 children of school age in the City; that he believes there has been a constant and rapid reduction in the number of children of school age in the City of Washburn since the years 1922 and 1923 (R. 117-118).

W. A. Robinson testified in the affidavit introduced by the appellants that he has been a resident of the City of Washburn continuously for more than thirty-five years; that he is the editor and publisher of a weekly paper which has been circulated in Washburn for thirty-five years; that he is familiar with the affairs of the City and has personal acquaintance with practically every resident of the City; that some time in the year 1928 for the purpose of ascertaining whether the circulation of his paper was as great as it should be, he carefully estimated and checked over the population of the City and came to the conclusion that the population was about 2,700, and that the population has been shrinking regularly and continuously for the past six years or more, and that such shrinkage still continues (R. 116-117).

Counsel, in his argument on the first appeal to the United States Supreme Court, argued that the evidence introduced to show diminution in population was not convincing and was not entitled to consideration. The only error appearing in the evidence is that the population was over-estimated. The 1930 census, of which the court will take judicial notice, *Town of Fletcher vs. Hickman*, 165 Fed.

463, 406, shows the present population of the City of Washburn to be 2,238.

(c) Scarcity of Industries in the City.

Undoubtedly the economic condition of the City of Washburn is caused in part, at least, by a scarcity of industries in the City. It appears that the industries are limited to an excelsior factory, which employs about twenty-five people, and a coal dock, employing about fifteen men (R. 117). In addition, the Du Pont Powder plant, located in the Town of Barksdale, employs about three hundred men, two hundred of whom live in the City of Washburn (R. 117). The industries enumerated constitute practically the only source of income for the City (R. 117).

(d) Evidence of Economic Conditions Practically Undisputed.

The evidence showing the economic conditions prevailing in the City of Washburn is undisputed, with one exception. The appellees introduced in evidence a statement showing that, according to the tax roll of warrants of the City of Washburn, the indebtedness on December 15, 1913, was $35,692.50; on December 14, 1924, $71,276.40; on December 8, 1925, $73,000.00; on December 20, 1926, $85,393.75; on December 22, 1927, $37,000.00; and on January 1, 1929, $33,000.00 (R. 143-144). Counsel argues from these figures that the economic conditions of the City of Washburn have improved. This evidence is totally at variance with the statement introduced by the appellees with respect to the value of property from 1914 to 1928, inclusive, and we do not believe that it constitutes any evidence as to the economic conditions prevailing in the City of Washburn.

At most, it shows good management on the part of the officers of a city in which the property values have declined, where the population has diminished, and where the industries have all but disappeared.

III. THE LOWER COURT ERRED IN HOLDING THE VALUE OF $75,000.00, FIXED BY THE RAILROAD COMMISSION, TO BE CONFISCATORY.

The lower court found that the lowest estimate of the cost of reproducing the utility property as of December 4, 1928 was $93,364.00 for the physical property, $800.00 for materials and supplies, $1,700.00 for working capital, and $5,000.00 for going value, a total of $100,864.00 (R. 72).

The Railroad Commission fixed the value of the utility property at the sum of $75,000.00, and it is conceded that no allowance was made for going value. It is our contention that the public utility property in Washburn has no going value and that the lower court erred in holding that going value amounted to $5,000.00.

The question is thus presented as to whether the value of $75,000.00 ($80,000.00, if allowance must be made for going value) is confiscatory, in view of the fact that the value of the property, based solely on cost of reproduction new, amounts to $100,864.00 ($95,864.00, if going value may be excluded).

The Railroad Commission, in its order of December 4, 1928, made no attempt to evade the issue by attempting to fix a value dominantly reflecting cost of reproduction new. The Commission frankly states in its order:

> "The Washburn Water Works property is located in a city in which every other class of property has suffered a great decline in value; that there are no prospects, so far as we can determine, that such decline is temporary or that substantial values will be re-established. To hold that the water works proper-

ty has not suffered this decline would be to ignore the facts. Certainly no purchaser having freedom of action would pay for this water works property anything like the original investment or the present cost of reproduction." (R. 37-38.)

(a) Economic Conditions in the City of Washburn May Be Considered in Fixing the Value of the Public Utility Property.

The evidence discloses that the economic conditions in the City of Washburn have directly affected one element of value of the utility property. In 1890, the utility purchased a parcel of real estate for $1,000.00 (R. 115-116). It is conceded by the utility's engineer that the value of this property, together with the other real estate owned, does not now exceed $275.00 (R. 96). It cannot now be claimed that the real estate owned by a utility has an increment of value over and above fair market value in the community in which it is located. That question was settled adversely to the utility in *Minnesota Rate Cases*, 230 U. S. 352, 454, where it was held not admissible to attribute to property owned by a railroad a speculative increment of value beyond that of similar property owned by others, "solely by reason of the fact that it was used in public service. That would be to disregard essential conditions of the public use, and to make public use destructive of the public right."

We are unable to see any good reason why the same rule should not apply to the physical elements of a plant other than the real estate. It would seem inconceivable that a public utility, which suffers the loss occasioned by the decrease in real estate upon which the plant stands, should not likewise suffer the loss occasioned by the actual decline in value of the real estate and improvements thereon.

From one point of view it might be said that this argument is one against the cost of reproduction principle, inasmuch as the decline in real estate values would not, for example, affect the cost of cast iron pipe, or the brick for the boiler house, or the pumps necessary for a water plant, in case the plant were to be reproduced. On the other hand, it cannot be said that when the value of real estate declines, such decline must be confined solely to the bare ground upon which the improvements stand. If that were true, a building which would cost $100,000.00 to construct (leaving out of consideration depreciation) will always be worth $100,000.00, notwithstanding the decline in value of the ground upon which it was constructed. Such is not the result in practice. The concomitant of a decline in value of real estate is diminution in value of the improvements located thereon.

A decline in real estate values is usually closely associated with a decline in population. Perhaps a typical case is a mining community which, overnight, becomes thickly populated and which as quickly becomes depopulated when the rich vein of mineral is exhausted. The City of Washburn may be compared to such mining community, although the process of disintegration has not been as rapid. In 1905 the population was 4,924, in 1910, 3,830, and in 1920, 3,707. The 1929 population was estimated at 2,700. It is a matter of common knowledge that a decline in population of 1,000, or approximately 30%, in a period of 9 years, will cause the value of property to decrease in the same or in a greater proportion.

Apart from the decline in real estate values, it does not call for argument that public utility property designed to serve, and which in the past has served, a population of 3,700, is not as valuable when it actually serves a population of 2,700. It may be argued that this is not the case with public utility property, inasmuch as it can demand an in-

creased rate to offset decrease in population and in customers. The application of this principle might afford temporary relief, but, as the customers diminished, the burden of maintaining the plant would become so onerous that no one could afford the service, and the point would some time be reached when the plant would be absolutely valueless because it had no customers.

The history of the utility has shown a decline in customers from 625 in 1919 (R. 121) to 525 in 1927 and 538 in 1928 (R. 109). With such an operating history in a city such as Washburn, which has been steadily declining in population, no purchaser of the public utility property, regardless of the rates which might be authorized, would pay, for the utility property, anywhere near cost of reproduction or investment cost. In fact, it is extremely doubtful whether any buyer could be found who would pay any substantial sum for such property. It is true that sale value is not necessarily a controlling factor in valuing public utility property, but, in the case of the utility property at Washburn, sale price would be a safe guide in determining actual value.

The best evidence that the economic conditions in the City of Washburn have very materially affected the value of the utility property is the fact that the utility, since 1925, has been in the hands of a receiver (R. 3). Such a condition is not strange when we consider that the only industries in the City of Washburn (aside from the Barksdale powder plant located outside of the city, and which employs 200 men) are an excelsior factory which employs about 25 people and a coal dock which employs 15 men (R. 117).

The utility, like all other property and business ventures in the City of Washburn, is not now and never can be financially successful.

It is proper, in valuing public utility property, to consider the locality in which the utility is located, and present and prospective earning capacity.

In *Southern Ry. Co. vs. Kentucky*, 274 U. S. 76, the court said (p. 82):

> "Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served."

The same principle is expressed in *Darnell vs. Edwards*, 244 U. S. 564, where it was held (570) that:

> "The circumstance that a road may have been unwisely built in a locality where there is not sufficient business to sustain it may be taken into account."

And further (p. 570) that:

> "If the earning capacity of the railroad, present and prospective, really is as small as appellant claims, it may be doubted whether the road is worth what it cost."

(b) Utility Plant is Larger than is Necessary to Serve the Present Population of Washburn, and the Lower Court Erred in Failing to so Find.

It is undisputed that the present plant of the utility was large enough to and did, in fact, serve a population of 3,707 in 1920, and 625 consumers in the year 1919. Inasmuch as the present population is less than 2,700, and the number of customers has been reduced to 537, it necessarily follows that the present plant of the utility is larger than is necessary to serve the present consumers and the present population of the City of Washburn. The appellants

duly requested the court to make such a finding, but, for reasons which we have not been able to fathom, the request was refused.

We refer to the fact that the utility plant is larger than is necessary to serve the present population of the City of Washburn, for the reason that a very substantial portion of the revenues of the utility is derived from the charge made to the City of Washburn for fire protection service. Under the rate schedule obtaining prior to the order of December 4, 1928, the City was charged and paid $7,070.40 per year for fire protection service (R. 41). The order of December 4, 1928 provided for a charge of $7,618.32 per year (R. 41). The Railroad Commission estimated that the total revenue for the year 1928 would amount to $17,720.40 (R. 40). In 1926 the total revenue amounted to $17,996.24 (R. 35).

It is clear that a system which is capable of furnishing fire protection service for a city with a population of 3,700 is larger than is required to furnish service for a population of 2,700. The photographs introduced in evidence and sent up for inspection by the court (see "Exhibit K") very eloquently show that many of the hydrants are now located in places where fire protection service is no longer necessary.

When we consider that the per capita cost for fire protection service in a city with a poplation of 2,700 amounts to approximately $2.60 per year as compared with a per capita cost of approximately $1.90 per year with a population of 3,700 in 1920, we cannot escape the conclusion that the plant is a great deal larger than is presently required to serve the City. The gravity of the situation becomes more apparent when we consider that subsequent to the issuance of the temporary restraining order the utility has been charging the City $13,059.34 per year for fire

protection service, a per capita charge of approximately $5.75, based on the 1930 census.

There is nothing in the record to show a comparison between the rates charged for fire protection service in Washburn and other cities in Wisconsin. We do, however, call the court's attention to the discussion of this subject in the dissenting opinion in *Ashland Water Co. vs. Railroad Commission*, 7 Fed. (2nd) 924, 939, which is equally applicable to the case at bar.

The fact that the population of the consumer, which contributes more than one-third of the income received by the utility, had diminished from 3,700 to 2,700 at the time of the trial must inevitably operate to reduce the value of the utility property. It is conceivable that the present cost of fire protection service will prove so burdensome that the City will cease to be a consumer, and will substitute chemical equipment for fire protection service in lieu of a water system.

(c) The Value of the Service Rendered Must Be Considered in Determining the Value of Public Utility Property.

The lower court, in holding that the value of $75,000.00 for the utility property was confiscatory, entirely overlooked the fundamental principle that a utility is entitled to charge only such rates as are fair to the utility and to the consumer. This principle was firmly established in *Smyth vs. Ames*, 169 U. S. 466, where the court said (p. 547):

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be extracted from it for the use of a public highway than the services rendered by it are reasonably worth."

This language has been cited with approval in many subsequent decisions, among them *St. Louis & O'Fallon R. Co. vs. U. S.*, 279 U. S. 461, 485; *Georgia R. & Power Co. vs. Railroad Commission*, 262 U. S. 625, 631.

Where the utility property is larger than is necessary to serve the present consumers, the utility is not entitled to a return on the entire value of its plant.

Darnell vs. Edwards, 244 U. S. 564, 569-570;
San Diego Land & Town Co. vs. Jasper, 189 U. S. 439, 446, 447;
Reagan vs. Farmers Loan & Trust Co., 154 U. S. 362, 412.

In the order of April 10, 1924, the Railroad Commission points out (R. 30) that the rates fixed by the order of October, 1922 "are among the highest in the state. The fire protection charge, based on the 1920 census, is about $1.86 per capita, and the charges for commercial service are considerably above the general run of such charges." The charges collected by the utility subsequent to the issuance of the temporary restraining order average 50% more than the charges which were denominated in the order of April 10, 1924 as being "among the highest in the state".

The case at bar seems to be governed by the principles laid down in *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, 412; *Covington, etc. Turnpike Road Co. vs. Sandford*, 164 U. S. 578; *San Diego Land & Town Co. vs. Jasper*, 189 U. S. 439; *Darnell vs. Edwards*, 244 U. S. 564 and *Southern Ry. Co. vs. Kentucky*, 274 U. S. 76, 81-82.

In *Covington, etc. Turnpike Road Co. vs. Sandford*, 164 U. S. 578, the court said (p. 596):

> "* * * It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon

its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * *"

In *San Diego Land & Town Co. vs. Jasper*, 189 U. S. 439, the court said (pp. 446-447):

"* * * If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return. * * *

The statute of California no doubt was contemplating the case of waterworks fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied. At all events we will not be the first to say so. * * *"

In *Darnell vs. Edwards*, 244 U. S. 564, the court said (pp. 569-570):

"The circumstances that a road may have been unwisely built, in a locality where there is not sufficient business to sustain it, may be taken into account. *Reagan vs. Farmers Loan & T. Co.*, 154 U. S. 362, 412, 38 L. Ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. And the nature and value of the service rendered by the company to the public are matters to be considered. *Covington & L. Turnp. Road Co. vs. Sandford*, 164 U. S. 578, 597,

41 L. Ed. 560, 566, 17 Sup. Ct. Rep. 198; *Smyth vs. Ames*, 169 U. S. 466, 544, 42 L. Ed. 819, 848, 18 Sup. Ct. Rep. 418."

The situation at Washburn is ably summarized in the language of Evans, Circuit Judge, in his dissenting opinion in *Ashland Water Co. vs. Railroad Commission*, 7 Fed. (2nd) 924, where he said (p. 943):

> "And if these results be not sufficiently startling in their nature, let the possibility of future depopulation of Ashland be considered. If the depopulation which has been going on for 30 years increase —if one-half of the present population should leave —the rates would be enormously increased. And if the rule be an unvarying one, we can continue the speculation until a condition would exist where the utility actually drove the citizens from the city."

(d) Value of $75,000 Established by the Order of the Commission is not Unreasonable.

In the light of the facts in the case at bar, we do not believe it can be said that the value of $75,000.00, fixed by the Railroad Commission, is unreasonable. We believe that the value reflects "reasonable judgment" based on "a proper consideration of all relevant facts". *Minnesota Rate Cases*, 230 U. S. 352, 452; *Standard Oil Co. vs. Southern Pacific Co.*, 268 U. S. 146, 156; *United Ry. & Electric Co. vs. West*, 280 U. S. 234, 251.

We may premise that the Railroad Commission acted fairly in fixing the value of $75,000.00. *Des Moines Gas Co. vs. Des Moines*, 238 U. S. 153, 163.

The burden rests upon the utility to prove the value upon which it is constitutionally entitled to receive a return, and such value must be supported by clear and convincing evidence. In *United Fuel Gas Co. vs. Railroad Commission*, 278 U. S. 300, 313, the court said:

> "The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants and, to justify judicial interference with the action of the state officers in fixing the rate of sale, must be supported by clear and convincing evidence,"

citing *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, 16.

In our judgment, the utility has failed to produce clear and satisfactory evidence showing, or even tending to show, that the value fixed by the Commission is confiscatory. The only evidence upon which the utility relies is that the value established is less than cost of reproduction new. Unless the value of utility property must in all circumstances dominantly reflect cost of reproduction new, the value fixed by the Railroad Commission, under all the facts in the case, ought not to be disturbed.

(e) The Lower Court Erred in Finding that the Going Value of the Utility Property Amounted to $5,000.00.

The value of $75,000.00 fixed by the Railroad Commission makes no allowance for going value, and we contend that there is no element of going value attached to the Washburn Water Works utility property.

The character of going value seems to be first discussed in *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, where the term is defined as follows, page 9:

> "The latter sum (going concern) we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return."

In *Des Moines Gas Co. vs. Des Moines*, 238 U. S. 153, 165, the court said:

> "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use."

This language has been cited with approval in *Denver vs. Denver Union Water Co.*, 246 U. S. 178, 191-192, and in *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 414.

It will be noted that the element of going value is based upon the fact that the utility is doing business and earning money. If the utility is doing business, but, by reason of the nature of the locality in which it is located it cannot make money, it would seem that there could be no element of going value as that term has been defined in the decisions cited.

In *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 414, the court cites from the decision of the Commission, as follows:

> "Any reasonable man with a knowledge of this property and the local conditions would unhesitatingly affirm that it had a value far in excess of the value of the pipe, buildings, grounds and machinery. Consider its earning power with low rates, the business it has attached, its fine public relations, its credit, the nature of the city and the certainty of large future growth, the way the property is planned and is being extended with the future needs of the city in view, its operating efficiency and standard of maintenance, its desirability as compared with similar properties in other cities and with other utilities of comparable size in this city. These things

> make up an element of value that is actual and not speculative. It would be considered by a buyer or seller of the property or by a buyer or seller of its securities."

In the statement of the Railroad Commission, going value is made to depend upon earning power, the character of the city in which the plant is located, and the opportunity for future growth. It is also suggested that going value is an element which would be considered by a buyer or seller of the property.

Somewhat the same thought is expressed in *New York Telephone Co. vs. Prendergast*, 300 Fed. 822, 826, where the court points out that a utility has going value because it goes well, and in *New York & Richmond Gas Co. vs. Prendergast*, 10 Fed. (2d) 167, 177, where the Special Master, speaking of going value, said, pages 177-178:

> "Going value may, in my opinion, be defined as the difference between what a prospective purchaser would pay for a fully completed and equipped plant ready to operate, but which in fact had never operated, and one fully completed and equipped which was actually operating, with an established business, as a going concern."

The Special Master further said, page 179:

> "I am impressed, however, with the fact that there is not, and cannot be, any mathematical formula or method for computing the amount and present worth of going value. In the absence of demonstration through an actual purchase and sale transaction, under fair conditions, its ascertainment must be a matter of competent business judgment as to what a purchaser would be willing to pay for such elements and properties, rather than undergo the costs of acquiring them anew."

See also *Galveston Electric Co. vs. Galveston*, 258 U. S. 388, 396.

Where, however, a utility is unable to earn money, it would seem that there is no element of going value. In *Southern Ry. Co. vs. Kentucky*, 274 U. S. 76, the court said (page 82):

> "No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called."

The evidence is undisputed that while the Washburn Water Works Company is doing business, the plant is not going well and is not making money. In fact, the utility is in the hands of a receiver. Nor is there any prospect that the business of the utility will improve. The diminution in population and the decrease in the number of customers conclusively establish that the utility cannot be a financial success. Furthermore, it is apparent that no prospective purchaser of the plant would consider an element of an additional value based upon the fact that it is actually in operation. It may well be doubted whether any purchaser could be induced to purchase the plant at any substantial figure.

We respectfully submit, upon reason and authority, that there is no element of going value attached to the property of the Washburn Water Works utility, whether we consider going value in terms of successful operation, or in terms of the ability to earn money, or in terms of added value in case of purchase or sale.

IV. THE LOWER COURT ERRED IN HOLDING THE RATES PROVIDED BY THE ORDER OF THE COMMISSION TO BE CONFISCATORY.

The order of the Railroad Commission provides for a return of 7% upon a value of $75,000.00, based on the operating expenses estimated by the Commission. The Commission estimated that the increased hydrant rental allowed by the order would provide a revenue sufficient to take care of the estimated operating expenses, amounting to $8,188.00, the depreciation reserve amounting to $937.50, taxes amounting to $3,742.82, and a return of $5,250.00, which amounts to 7%, on the rate base of $75,000.00.

The operating expenses estimated by the Commission did not represent actual expenses, but estimated expenses based on savings which could be made through the installation of an additional pump with a smaller motor, and the installation of meters. The Commission also refused to make an allowance for amortization of accumulated railroad commission and legal expense. The lower court found that the Railroad Commission exceeded its jurisdiction in refusing to allow actual operating expenses and in refusing to allow amortization of accumulated Railroad Commission and legal expense.

(a) The Lower Court Erred in Holding that the Railroad Commission Had No Jurisdiction to Reduce Operating Expenses of the Utility.

In defending the refusal of the Railroad Commission to accept actual operating expenses of the utility, we are not unmindful of the principle long established that the Commission is not the financial manager of a utility, and has no power to substitute its judgment for that of the owners of

the utility, and that it cannot ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the owners of the utility. *State Public Utilities Comm. vs. Springfield Gas & E. Co.*, 291 Ill. 209, 234; *Brooklyn Borough Gas Co. vs. Prendergast*, 16 Fed. (2nd) 615; *Missouri ex rel. Southwestern Bell Teleph. Co. vs. Public Service Comm.*, 267 U. S. 359, 363.

The evidence, as we shall show, establishes that there has been an abuse of discretion by the owners of the utility with respect to operating expenses, and that the management of the plant has been reckless and extravagant.

The Commission estimated that the 1928 operating expenses would amount to $8,188.00 exclusive of taxes and depreciation (R. 40). The actual operating expenses for the year 1928 on the same basis amounted to $11,279.90 The latter figure includes an item amounting to $1,224.25 for legal, engineering and railroad commission expense. This latter item is not a normal operating expense for the future, as indicated by the fact that in 1927 the legal, engineering and Railroad Commission expense amounted to only $390.00.

Apart from the item of $390.00 for legal expense, based on the 1927 operating expenses, this court would hold as a matter of law that legal expenses constituting 10% of the normal operating expenses, considering the size and income of the utility, would be exhorbitant, wasteful and extravagant. We believe it may be fairly assumed that the proper and reasonable legal and Railroad Commission expense for the ensuing year ought not to equal that expense for the year 1927, which is in fact high, considering all the circumstances. It is true that the operating expenses for the year 1928, estimated by the Commission, do not make allowance for the item of $1,224.25, but the reasonableness of the estimate of the Commission ought to be considered

with respect to actual operating expenses which will be incurred in the future.

The utility estimated operating expenses in the future to be $11,003.00, which includes the item of $1,000.00 for amortization of accumulated Railroad Commission and legal expense. If this item is deducted, the estimated operating expenses will amount to approximately $10,000.00 according to the utility's estimate. This estimate does not take into account any future saving based upon the actual saving in power costs of $439.03 in 1928, and that item is estimated for the future to be $4,581.00. The question thus narrows down to the proposition as to whether the Railroad Commission was arbitrary in estimating the operating expenses for the future to be $8,188.00 exclusive of taxes and depreciation, in view of the fact that the estimated expenses for the future, exclusive of legal expenses, amounts to $10,000.00.

One of the grounds upon which it was contended that the Railroad Commission had no jurisdiction to reject actual operating expenses was that the Commission, as the lower court found, disregarded the fact that the utility had entered into a contract with an electrical utility for the purchase of power, which contract does not expire until May, 1931 (R. 75). The finding of the lower court is literally correct, inasmuch as the Railroad Commission did not consider the contract. In making this finding the lower court overlooked the fact that the cost of power purchased, under the contract, for the year 1928, was approximately $440.00 less than that for the year 1927 (R. 90).

The arbitrary character of the utility's attack on the order of the Commission is shown in the utility's estimate of normal expenses for the future, in which it appears that the cost of power will remain the same as for the year

1928, in spite of the substantial reduction in such cost in 1928.

The evidence shows that an electrical pump was installed in August, 1926 (R. 95), and that in 1926 there were seven months of steam pumpage and five months of electric pumpage. In the year 1925 it appears that the pumpage amounted to 135,961,411 gallons, in the year 1926 to 97,311,264 gallons, in the year 1927 to 68,550,000 gallons.

We contend that a substantial portion of the decrease in pumpage with the consequent reduction in cost of power for pumping purposes, is due to the installation of meters. No claim is made that the decrease of the pumpage from the year 1925 to 1926 was due entirely to the installation of meters. Undoubtedly, as the utility's engineer pointed out, the reduction can be accounted for by the fact that the pumpage of the steam pump was computed by the strokes of the pump, and that by reason of the slippage in the old pump the figures were not accurate (R. 94-95). The fact remains, however, that the pumpage in the year 1928 decreased 9,200,000 gallons, or approximately 13.4 per cent. One of two reasons contributed to the reduction—either the consumption of water was less, or there was a saving accomplished through the use of meters. If the decrease may be attributed entirely to a decrease in consumption of water, then the utility is in a much more precarious condition by reason of reduced consumption than was pictured in the preceding sections of this brief. If the decrease is due to the installation of meters, it is apparent that a tremendous saving can be effected through the installation of meters.

The utility contends that it has no funds with which to purchase and install meters, and that it is not economical to install them, but the evidence shows that a deposit was ob-

tained from all customers who received metered service in 1929 (R. 107).

It seems to be more than a coincidence that the increase in the number of meters installed bears a close relationship to the decrease in pumpage. In 1928 the company had 14.66% more meters installed than during the year 1927 (R. 109). The pumpage for the year 1927 was 68,550,000, and in 1928 was 59,340,000, or a decrease of 13.4%. While it does not necessarily follow that the decrease is due entirely to the installation of meters, it is particularly significant that the percentage of increase of meters practically coincides with the percentage of decrease of pumpage. In this connection we also call the court's attention to the fact that in 1927 power costs for pumping amounted to $5,020.08, and in 1928, $4,581.05 (R. 96), a decrease of approximately 10%.

On March 11, 1929, the company had in place approximately 30% more meters than in the year 1928. If we assume that no more meters were installed during the year 1929 and that the same ratio of decrease in cost of power purchased for pumping purposes would obtain during the year 1929 (14% increase in meters resulting in 10% decrease in cost of power for pumping purposes), it would follow that the cost of power for pumping purposes during the year 1929 would be approximately 20% less than for the year 1928, or approximately the sum of $3,665.00 as compared with $4,581.05 for the year 1928.

We do not contend that if all customers were metered, the power costs and the pumpage would decrease in the proportion above mentioned. The evidence does, however, show that a very substantial saving can be effected through the installation of meters, the present cost of which can be partly absorbed by continuing to require the metered customers to make a deposit.

It would seem to be self-evident that a utility which deliberately refrains from effecting a substantial saving in operating costs through the installation of meters, where at least a portion of such costs can be absorbed by requiring a deposit from the consumer, is guilty of gross mismanagement and extravagance, particularly where, as here, the number of customers is relatively small, and where the number of customers is gradually diminishing.

The same situation obtains with respect to the failure of the utility to install a smaller electric pump with a smaller motor. The engineer of the Railroad Commission aptly points out that such an installation will operate to reduce the demand and rate of electric power for pumping purposes, and that a saving of $2,000.00 per year in cost of power purchased can be effected (R. 111-112).

Unless the rights of the consumer in the City of Washburn are to be totally ignored, it would seem that the utility has no valid objection to the action of the Commission in reducing operating expenses. A saving of $2,000 per year in operating expenses would amount to approximately $4.00 for each of the 538 consumers of the utility. In view of the fact that the present rates charged are among the highest in the State, it is the duty of the utility to exert every effort toward reducing its operating expenses.

The evidence thus shows that the utility can, by the elimination of its wasteful and extravagant practices, reduce its operating expenses at least $2,000.00 per year. This saving will offset the difference of $1,817.65 between the estimated operating expenses of $8,108, adopted by the Commission, and the actual operating expenses for the year 1928, exclusive of Railroad Commission and legal expense, amounting to $10,005.65.

(b) The Lower Court Erred in Holding that the Refusal of the Commission to Allow Any Sum for Amortization of Accrued Legal and Railroad Commission Expense was Arbitrary and Unsupported by the Evidence.

The Railroad Commission in estimating the future operating expenses of the utility refused to make any allowance for amortization of accrued Railroad Commission and legal expense, and the lower court found that such refusal of the Railroad Commission was arbitrary and not supported by the evidence.

The record does not definitely show how or when the expense was incurred. In the bill of complaint it is alleged that this expense was not incurred entirely in contesting the orders of the Railroad Commission, but was also incurred in collecting hydrant rentals from the city (see 218 N. W. 825) and for other matters incident to the management of the company.

The case referred to, *Washburn Water Works Company vs. City of Washburn*, 218 N. W. 825, was decided on April 3, 1928. It thus appears that at least a portion of the Railroad Commission and legal expense was incurred almost a year before the date of the Commission's order.

It further appears that the $5,000.00 item of accumulated Railroad Commission and legal expenses consists in part of an item of $2,290.24 which was due for Mr. Smart's services (R. 88-89). It does not appear in the record, but it will not be denied, that Mr. Smart died some time prior to the decision in 218 N. W. 825.

It is elementary that:

> "Past losses cannot be used to enhance the value of the property or to support the claim that rates for the future are confiscatory." *Board of Public Utility*

Comrs. vs. New York Teleph. Company, 271 U. S. 23, 31; *Galveston Electric Company vs. Galveston*, 258 U. S. 388, 395; *Georgia R. & Power Company vs. Railroad Commission*, 262 U. S. 625, 632.

In effect, the utility in contending that the $5,000.00 item should be amortized at the rate of $1,000.00 a year for the next five years, is seeking to have a rate established which will compensate for losses incurred in the past. The utility might just as well have deferred the payment of all expenses for the period of two or three years before the order was entered, and then have come before the Commission and asked to have all of these expenses amortized during the next five-year period. In this way the utility could obtain indirectly a rate which would compensate for past losses, something they could not have obtained had they paid the expenses as they went along.

The Railroad Commission and legal expense was not an unusual expense of the type which is ordinarily amortized over a period of years, such as the expense incurred in repairing the damage wrought by an act of God, such as a heavy sleet and snow storm, or a flood. It was simply an accumulation of expenses which should have been paid prior to the entry of the order, and we are unable to find any authority which requires amortization of such items. Hence we submit that the Railroad Commission was justified in refusing to make any allowance for amortization of such expenses, and that the lower court erred in holding the action of the Railroad Commission to be arbitrary and unsupported by the evidence.

If the court shall be of the opinion that a portion, or all, of the accumulated Railroad Commission and legal expense should be amortized, we submit that the amortization period should be at least 10 years, instead of 5 years. If this expense is amortized over a period of 5 years, almost 10% of the operating expenses, exclusive of depreciation and

taxes, will consist of Railroad Commission and legal expenses, which is very excessive for the Washburn Water Works utility. If the expense is amortized over a period of 10 years, the burden on the consumers, while still extremely heavy, will be reduced materially. We believe that this latter plan should be adopted, particularly from the point of view of determining the reasonableness of the return afforded by the Commission's order.

(c) The Lower Court Erred in Holding that a Return of 7% on a Value of $75,000.00 Was Confiscatory.

It has always been held that the question as to whether a rate yields a fair return must be determined in the light of the circumstances of each particular case, and that no particular rate can be established for all cases.

In *Willcox vs. Consolidted Gas Company*, 212 U. S. 19, 48, the court said:

> "There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality."

In *Bluefield Water Works & Imp. Co. vs. Public Service Commission*, 262 U. S. 679, 693, it was held that the question whether a rate yields such a return as not to be confiscatory, depends upon circumstances, locality, and risk, and that no proper rate can be established for all cases.

The court further said (page 692):

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts."

In *Dayton-Goose Creek R. Company vs. United States*, 263 U. S. 456, 486, the court held that the question of the minimum of a fair percentage on value, varies with the circumstances.

In *United Railway and Electric Company vs. West*, 280 U. S. 234, 249, the court said:

> "Nor can a rule be laid down which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending upon circumstances, locality and risk."

The court further said, page 251:

> "What will constitute a fair return in a given case is not capable of exact mathematical demonstration. It is a matter more or less of approximation, about which conclusions may differ.
>
> The court in the discharge of its duty on the issue of confiscation must determine the amount to the best of its ability in the exercise of a fair, enlightened and independent judgment as to both law and facts."

A return of 6% was not found confiscatory in *Willcox vs. Consolidated Gas Company*, 212 U. S. 19, 48; *Cedar Rapids Gaslight Company vs. Cedar Rapids*, 223 U. S. 655, 670; or in *Des Moines Gas Company vs. Des Moines*, 238 U. S. 153, 172.

In *McCardle vs. Indianapolis Water Company*, 272 U. S. 400, 402, it was held that a return of 7% was not confiscatory, but in *United Railway and Electric Company vs. West*, 280 U. S. 234, it was held that a street railway utility was entitled to a return of not less than 8%.

Mr. Maxcy testified in his affidavit that a return of 8% was necessary in order to attract capital and keep it interested in the utility. No other evidence was offered, either by the utility or the appellants, concerning a proper rate of return for the utility property in the City of Washburn.

In view of the economic conditions prevailing in the City of Washburn, it is apparent that no industry in the City could possibly make a return of 7% on the fair value of its property. We do not believe that the water utility in the City of Washburn, merely because it is a utility, is entitled to receive a return any greater than that received by an ordinary business enterprise in the City. In other words, the return to which the utility is entitled must be commensurate with the return received on capital invested generally in the City of Washburn. We believe that the return provided in the order of the Railroad Commission reflects the exercise of a fair and enlightened judgment, having regard to all relevant facts.

Even if it be held that the action of the Railroad Commission was arbitrary in refusing to allow actual operating expenses for the purpose of determining a fair return, the order ought not to be set aside as confiscatory merely on that ground. If the utility is entitled to no greater return than that of the ordinary business enterprises in the city of Washburn, the court would be justified in holding that a return of less than 7% is sufficient under all the facts and circumstances. Whether we consider that the return afforded by the order represents 7%, based on the estimated operating expenses, or a return of less than 7%, based on actual operating expenses, is immaterial. The order of the Railroad Commission will not be set aside merely because of defective reasoning of the Railroad Commission. *Northern Pacific R. Company vs. Dept. Public Works*, 268 U. S. 39.

CONCLUSION.

In conclusion we submit that the lower court erred in holding that the value of $75,000.00 placed upon the property of the Washburn Water Works utility by the Railroad

Commission was arbitrary and confiscatory, and in holding that the return afforded by the order was confiscatory. The evidence discloses that the City of Washburn has suffered one of the most disastrous reverses in the history of Wisconsin cities. In view of the economic conditions prevailing in the city we believe that the Railroad Commisson valued the utility property upon the basis of reasonable judgment, having due regard to all relevant facts, and fixed a rate of return which reflects the exercise of a fair and enlightened judgment in the light of all the facts and circumstances. The utility, we believe, has utterly failed to establish by clear and convincing evidence either that the value or return provided in the order is confiscatory, and we do not believe the judgment of the Railroad Commission is either arbitrary or unreasonable.

We respectfully submit that the decree of the lower court should be reversed.

Respectfully submitted:

JOHN W. REYNOLDS,
Attorney General,

SUEL O. ARNOLD,
Special Counsel,
Attorneys for the Appellants.